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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 633

SUPERIOR PACKING COMPANY, a corporation,
Petitioner,

vs.

PAUL A. PORTER, Administrator, Office of Price Administration,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

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SUPERIOR PACKING COMPANY, a corporation,
Petitioner,

vs.

PAUL A. PORTER, Administrator, Office of Price Administration,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The Petitioner, Superior Packing Company, a corporation, prays that a Writ of Certiorari be issued by this Court to review a judgment of the Circuit Court of Appeals for the Eighth Circuit entered July 5, 1946, affirming a judgment of the United States District Court for the District of Minnesota, entered August 17, 1945.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit was rendered and filed July 5, 1946 and is reported in 156 Fed. 2d, 193. (Advance Sheets of Federal Reporter 2d Series, September 9, 1946).

STATEMENT OF THE CASE.

The affirmed judgment of the District Court was rendered in an action brought by the Price Administrator against Petitioner to recover treble damages under Section 205 (e) and for an injunction under Section 205 (a) of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended; 50 U.S.C.A. App. Secs. 901-946. The judgment is predicated upon claimed violations of the Carload Discount Provisions of Revised Maximum Price Regulation No. 169, as amended, (hereinafter referred to as R.M.P.R. 169 and Maximum Price Regulation No. 398, as amended (hereinafter referred to as M.P.R. 398).

The complaint, filed October 5, 1945, by the then Price Administrator Chester A. Bowles, alleged that the defendant, (Petitioner here) sold beef carcasses in carload lots at prices exceeding the maximum prices permitted under Sections 1364.453 (b) and 1364.454 (a) of R.M.P.R. 169, and sold fresh and processed variety meats and edible by-products in violation of Section 15 (b) of M.P.R. 398. The complaint charged that in the sale and shipment of both beef carcasses and variety meats Petitioner failed to deduct twenty-five cents per hundredweight from the applicable zone price, said discount being deductible when such sale and shipment involved the sale of carload lots of 15,000 pounds or more (R. 2-6).

The District Court found that the agents of Petitioner read the regulations, consulted with meat brokers about the applicability thereof, and concluded that said regulations did not require a carload discount on sales and deliveries where the contents of the carload were separately sold and consigned in smaller than carload lots to separate customers. The District Court further found that the conduct of the defendant did not amount to wilfull violations of these price regulations and was not the result of the failure to take reasonable and practicable precautions to prevent the occurrence of violations of the discount regulations (R. 99).

The District Court refused to allow any sum other than single damages as to all parts of the Price Administrator's claim, except as to one conceded inadvertent overcharge of $440.50, as to which the Court awarded damages in the sum of $660.75 which was one and a half times the amount of the overcharge.

Judgment was entered in the sum of $29,814.47 and the Trial Court also ordered that Petitioner and its agents be enjoined from selling, delivering or offering to sell and deliver, meats at prices in excess of the maximum prices permitted under R.M.P.R. 169 and M.P.R. 398 (R. pp. 101-102), although the sales practice which was the subject of the Administrator's Complaint had already been stopped by Petitioner upon notice from the Office of Price Administration that it was objectionable (R. 34).

Petitioner is an Illinois corporation, maintaining an Illinois plant at Chicago, and, also, operating a plant at St. Paul, Minnesota where it slaughters beef, selling and shipping the products of that plant at wholesale, in railroad refrigerator cars, to customers in various large eastern

cities, including Boston, Washington and New York (R. pp. 28, 29). Petitioner does not can, cure or process meat.

The evidence, which is not in dispute, discloses that Petitioner sold and shipped meat in carloads, usually amounting to 25,000 pounds or more, under two systems of sale and delivery. Both of these systems had been adopted long prior to the enactment of the Emergency Price Control Act (R. p. 23). For purposes of convenience on the trial in the District Court, one method of sale and shipment was designated the "Boston System" and the other the "Washington System". Under the Boston System, Petitioner shipped carloads of meat to Boston, Massachusetts and other eastern points, consigning such carloads to one consignee located at the delivery point, but the contents were selected and destined for, and invoiced to, a number of separate customers. Upon arrival of the car at destination, the consignee named, usually one of the customers, would notify the other customers to whom the contents were separately invoiced, and thereupon each such separate customer would make his own arrangements and pay for the local transportation of his portion of the carload to his individual place of business (R. pp. 31, 32). It was as to sales made under this "Boston" practice that the Price Administrator instituted the suit which resulted in the judgment here under consideration.

Under the Washington System, Petitioner sold and shipped carloads of meat to Washington, D. C. and other points consigning the car to itself, or to a designated agent. Upon arrival at destination, Petitioner arranged and paid for delivery to the respective places of business of the purchasers who had made purchases of portions of such carload lot (R. pp. 30, 31).

During the period between October 6, 1943 and October 4, 1944, carloads of meat, each weighing over 15,000 pounds, were shipped under the Boston Method, comprising a total of 10,218,732 pounds of beef carcasses and 1,442,757 pounds of variety meats. The carload discount of twenty-five cents per hundredweight, if allowed, would amount to $25,546.82 on the beef carcasses, and to $3,606.89 on the variety meats.

A correct and illustrative instance of the questioned practice of Petitioner is contained in the opinion of the Court of Appeals, as follows (156 Fed. (2d) at page 194):

> "The practice of the defendant giving rise to the present dispute is illustrated by the shipment of its beef products to the city of Boston where it had four customers to whom it sold an average of one or more carloads a week during the period involved. That part of each carload sold to one of these customers was less than 15,000 pounds, but the total carload or the sum of the four sales exceeded that amount. The car was consigned to one party but the contents were labeled and invoiced to the several customers. Upon arrival of the car in Boston the consignee notified the purchasers each of whom thereupon picked up his portion of the shipment. The defendant paid the freight charges to Boston and each customer paid the transportation charges from the point of delivery to his place of business."

In January, 1943, the Office of Price Administration conducted an investigation of Petitioner's office and plant at St. Paul, spending about a week there. Three small matters, not here relevant, were then discovered and corrected, but no mention was made of the sales practice complained of in the instant complaint, although Petitioner then asked if there was anything else which was not in order, and

the representative of the Price Administrator answered, "No" (R. p. 38).

The Price Administrator successfully contended in the District Court and in the Court of Appeals that, under the Boston Method, Petitioner should have deducted twenty-five cents per hundredweight from the applicable zone price for meat sold to each customer, even though such customer bought and received only a portion of the carload shipment. Petitioner allowed said discount to customers taking 15,000 pounds or more.

In making shipments of carloads of meat to Washington, D. C. and other eastern points, where the Washington System of selling and delivering was established, Petitioner was authorized to, and did, make a charge of twenty-five cents per hundredweight for delivery from the freight car to the place of business of the buyer. This authorization is found in Section 1364.45 (3) of R.M.P.R. 169. The actual cost of such local delivery was approximately ten cents per hundredweight less than the allowable delivery charge, and, hence, Petitioner received a permitted spread of ten cents per hundredweight, being the difference between the actual cost of the cartage and the authorized delivery charge. Moreover, under the Washington System, Petitioner was not required to allow the twenty-five cents per hundredweight carload discount from the zone price. When, at the insistence of the Office of Price Administration, Petitioner abandoned its Boston Method and began operating under the Washington Method, in sales and deliveries to Boston and other eastern points, a financial benefit to Petitioner resulted (R. p. 51).

Statement As to Jurisdiction.

The jurisdiction of this Court is invoked and sustainable under Section 240 (a) of the Judicial Code, as amended, by the Act of February 13, 1925, Chap. 229 (43 Stat. 938; U.S.C.A. Title 28, Sec. 347).

Relevant Parts of Statutes Involved.

Emergency Price Control Act of 1942; Section 205 (e); 56 Stat. 23, as amended, Title 50, U.S.C.A. Sec. 925 (e).

"If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater:

(1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50.00, as the court in its discretion may determine; Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word

'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price."

Sec. 205 (a) of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U.S.C.A. Sec. 925 (a):

"Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act (section 904 of this Appendix), he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

Sec 2 (a) of the Emergency Price Control Act; Title 50 U.S.C.A. App. Sec 902 (a):

"Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a Statement of Considerations involved in the issuance of such regulation or order."

Relevant Parts of Regulations Involved.

R.M.P.R. 169, Sec. 1364.453 (b):

"Carload discount. For all beef carcasses and/or beef wholesale cuts and/or other meat items subject to this subpart B and Sec. 1364.453 and Sec. 1364.454, delivered in a straight or mixed carload shipment or sold as a part of a straight or mixed carload sale, the seller shall deduct 25 cents per hundredweight from the applicable zone price."

R.M.P.R. 169, Sec. 1364.455 (a) (2) (definition of a carload):

" 'Carload' means:

"(i) A shipment by rail of fresh or frozen whole-

sale meat cuts, and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing to a single delivery point, of at least the maximum weight upon which the railroad rate from the point of shipment to the delivery point, as evidenced by the tariffs of railroad carriers, is based. Provided, that where the transportation charge for shipment of a lesser weight at the railroad carload rate would be lower than the transportation charge for such a shipment at the railroad less-than-carload rate, such lesser shall be considered a carload;

"(ii) A shipment by motor truck or trucks to a single delivery point of 15,000 pounds or more of fresh or frozen wholesale meat cuts and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing, as a single bulk sale transaction; and

"(iii) Any single bulk sale transaction wherein the buyer takes delivery at the seller's place of business of 15,000 pounds or more of fresh or frozen wholesale meat cuts and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing."

M.P.R. 398, Sec. 15 (b):

"Carload discount. For all variety meats and edible by-products delivered in a straight or mixed carload shipment or sold as a part of a straight or mixed carload sale, the seller shall deduct 25 cents per hundredweight from the applicable zone price."

R.M.P.R. 169, Section 1364.451 (a) (2) (Pricing Instructions):

"Except for the additions permitted in Schedule III hereof, incorporated herein as Sec. 1364.454, the zone price shall be the delivered price anywhere within the zone, to which such price applies. Schedules I (paragraph (a) to (j) inclusive) hereof, incorporated here-

in as Sec. 1364.452, contains a statement describing the geographical limits of each price zone and the zone prices established therefor.

(2) The applicable zone price shall be the price specified in Schedule I (Sec. 1364.452) for the zone in which is located the seller's distribution point:

(i) At which the buyer takes actual physical possession of the meat; or

(ii) From which local delivery to the buyer's place of business begins; or

(iii) From which the meat, consigned to the buyer, (a) is delivered to a common carrier, other than a railroad, for shipment to the buyer, who pays the shipping charges directly to the carrier, or (b) is delivered to a railroad for shipment at the carload rate to the buyer who pays the shipping charges directly to the carrier."

The Questions Presented.

I.

Are the carload discount provisions of R.M.P.R. No.. 169, as amended, and M.P.R. No. 398, as amended, applicable to actual sales of less than carload lots merely because the seller ships in carload quantities, not to buyers of carload lots but to a designated consignee (who might or might not be one of the buyers) and the buyers of portions of such carload lot, in less than 15,000 pound quantities, to whom such lesser quantities are invoiced, take possession and delivery from the point of destination of such carload lots?

II.

If the carload discount provisions of R.M.P.R. 169 and M.P.R. 398 are to be enforced and construed according to

their current, and not the original, interpretation, by the Price Administrator, and require that the fixed and arbitrary discount be granted by the seller, based upon transportation charges only, disregarding all other increases and differences in selling costs in sales of quantities smaller than carload lots, do such provisions amount to the taking of property without due process of law and are they unreasonable, oppressive and arbitrary and hence violative of the Fifth Amendment to the Constitution of the United States?

III.

May the Price Administrator at the time of the issuance of a price regulation give his reasons for the issuance thereof and his interpretation of their purpose and intent, and afterwards, when sales of commodities have been made in reliance upon such original interpretation, change his announced purpose and intent and so construe such regulations as to impose liability upon sellers who in good faith relied upon the original interpretation?

Reasons Relied On for the Allowance of the Writ.

The Circuit Court of Appeals for the Eighth Circuit, in its opinion and judgment, decided important questions of federal law which have not been, but which should be, decided by this Court.

This Court has not decided questions I, II and III above.

The Circuit Court of Appeals for the Eighth Circuit decided a question of federal law in conflict with the applicable decisions of this Court.

This Court in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, held that the ultimate criterion in as-

> certaining the meaning of regulation, "is the administrative interpretation which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. * * *"

The original interpretation by the Price Administrator, announced simultaneously with the issuance of the regulations in question, must be regarded as thereafter controlling and not subject to change by time or circumstance, because, in the interim between such original interpretation and any subsequent contrary construction, sales would be made and rights and liabilities created in reliance upon the language of the regulations into which has been written the original announcement of purpose and the original construction.

The Circuit Court of Appeals for the Eighth Circuit, in its opinion and judgment, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's discretion.

> The Circuit Court of Appeals failed to notice or pass upon important questions presented to it for decision.
>
> The Court of Appeals, in its opinion stated that "without hesitation both the Administrator and the trial court construed these regulations to be applicable to defendant's practice of selling its beef products." In so holding, the Court of Appeals disregarded the fact that the Trial Judge said that the regulations were involved; that laymen could well err in violating them (R. p. 102); that Petitioner had sustained the burden of taking precautions against violating the regulations (R. p. 93); that the case presents an anomalous situation (R. p. 89); and that "there was this conflict between some of the language used by the Administrator in the regulations." (R. p. 112.)

The Court of Appeals, moreover, did not take into consideration the fact that the Trial Judge, over the resistance of the Price Administrator, deemed the regulations sufficiently doubtful in meaning and validity to grant such leave to appeal to the Emergency Court of Appeals (R. p. 112).

The Court of Appeals, while conceding that the administrative interpretation appearing in the Statement of Considerations seemed to support Petitioner's contentions, accepted the Price Administrator's argument that the language used in the Statement of Considerations was for purposes of illustration only, an obviously incorrect conclusion from the language used.

The Court of Appeals, in stating that the language of the regulations was unambiguous, disregarded every provision thereof in conflict with the belated administrative interpretation adopted for the purpose of sustaining the complaint against Petitioner.

The decision of this Court of the questions presented, particularly as to the propriety of changing the original announcement of intent and purpose and the original construction of a price regulation, would not affect, only, the Price Administrator and the Emergency Price Control Act. In a nation largely governed by administrative agencies whose regulations have the full force of law, administrative orders and regulations should be drafted with the care and clarity of a legislative act. And if an interpretation be announced by an agency administrator at the time of the issuance of a regulation, and such interpretation is controlling upon the courts, as this Court has said, then the regulation as so interpreted becomes a part of the law of the land, immune from subsequent inconsistent constructions which may from time to time serve a changing enforcement policy. It is necessary for this Court to announce that there can be no inconsistent, *ex pact facto*

interpretations and constructions by such agencies under the Constitution of the United States.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Court to review the decree of the Circuit Court of Appeals for the Eighth Circuit, and prays that said judgment be reversed and that your Petitioner may have such other and further relief in the premises as to this Court shall seem meet and just.

SUPERIOR PACKING COMPANY,

By .....
THEODORE E. REIN

.....
RICHARD S. FELHABER

.....
ALEXANDER T. SPARE

.....
GUSTAV A. LARSON

Certificate of Verification.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

THEODORE E. REIN, being first duly sworn, deposes and says:

That he is one of the attorneys for Superior Packing Company, a corporation, Petitioner in the within and fore-

going Petition; that he, with co-counsel, prepared the within Petition and that the matters therein are true as he verily believes, and that the same is not interposed for the purpose of delay.

Theodore E. Rein

THEODORE E. REIN

Subscribed and sworn to before me
this 19th day of October, 1946.

Hector S. Scheffer

Notary Public in and for the State
of Illinois, County of Cook.

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IN THE

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OCTOBER TERM, A. D. 1946.

No. _____

SUPERIOR PACKING COMPANY, a corporation,
Petitioner,

vs.

PAUL A. PORTER, Administrator, Office of Price Administration,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit was rendered and filed July 5, 1946, and is reported in 156 Fed. 2d 193, (Advance Sheets of Federal Reporter, 2d Series, September 9, 1946).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 329, (43 Stat. 938; Title 28 U.S. C.A. Section 347). The opinion of the Circuit Court of

Appeals for the Eighth Circuit was filed July 5, 1946. Petition for rehearing was denied and judgment entered September 23, 1946, at which time a stay order was granted to continue until the final disposition of the case by this Court. The instant Petition for Writ of Certiorari is filed pursuant to and in accordance with Rule 38 of this Court.

Statement of the Case.

To avoid repetition, the Statement of the Case in the Petition for Writ of Certiorari, in support of which this Brief is filed, is hereby adopted. Such other facts as may be incidentally necessary to be considered in connection with the questions raised on this application, will be pointed out and supported by record references in the ensuing argument.

Specifications of Errors Intended to Be Urged.

1. The Circuit Court of Appeals erred in holding that the carload discount provisions of the Revised Maximum Price Regulation No. 169, as amended, and Maximum Price Regulation No. 398, as amended, were applicable to actual sales of less than carload lots where the seller ships in carload quantities to a designated consignee and the several buyers of the contents of the car take possession and delivery from the point of destination of the carload.

2. The Circuit Court of Appeals erred in holding that the failure of Petitioner to make the deductions from the zone price of the carload discount of twenty-five cents per hundredweight on sales of beef carcasses and variety meats in less than carload quantities, violated Section 1364.453 (b) of R.M.P.R. No. 169, as amended, and Section 15 (b) of M.P.R. 398, as amended, respectively.

3. The Circuit Court of Appeals erred in failing to hold that the carload discount provisions of R.M.P.R. No. 169, as amended, and M.P.R. 398, as amended, are to be enforced and construed according to the original interpretation thereof by the Price Administrator, and in holding, on the contrary, that a subsequent interpretation by the Administrator required the allowance to buyers of less than carload lots, of the carload discount of twenty-five cents per hundredweight, disregarding in such holding, all increases in selling costs in the sale of quantities smaller than carload lots, over carload sales, and basing its decision entirely upon the smaller transportation rate of public railroad carriers for transporting carload quantities.

4. The Court of Appeals erred in disregarding pertinent language of the carload discount provisions of R.M. P.R. No. 169, as amended, and M.P.R. No. 398, as amended, which plainly contemplate that the discount provisions of said regulations require the allowance of the discount only where a carload quantity of 15,000 pounds or more is shipped as the result of a single, bulk sale transaction.

SUMMARY OF THE ARGUMENT.

I.

The carload discount provisions of Revised Maximum Price Regulation No. 169, as amended, and Maximum Price Regulation No. 398, as amended, are not applicable to actual sales of less than carload lots where the contents of such carloads are sold and invoiced to several separate buyers and where the seller ships the carload quantity to a designated consignee, the buyers of the contents taking possession and delivery at the point of destination of the carload.

In the decision below, the Court failed to take into consideration all of the discount provisions of the regulations in question.

The plain language of the discount provisions, the administrative purpose back of the regulations, and the whole purpose and scope of the Price Control Act demonstrate that the carload discount provisions apply to shipments of carload quantities to buyers of carload quantities.

The facts, which are not in dispute, show Petitioner shipped in carload quantities to Boston and other eastern points, consigning to one consignee but invoicing the contents to the several buyers of allocated portions of such carload, each of whom took his portion from the freight car and carted it to his place of business. This was known as the "Boston System". It is as to sales under this system that Petitioner did not allow carload discounts by reason of which the present judgment was entered.

Petitioner also did business under the "Washington System" under which Petitioner shipped carload amounts

to other eastern points, consigning the car to itself or its agent, and invoicing the contents to the several buyers thereof. Petitioner arranged for cartage to the places of business of the several buyers for an additional compensation of twenty-five cents per hundredweight. This Washington System, identical in all substantial respects to the Boston System, was approved, or at least not objected to, by the Price Administrator, although it resulted in greater benefit to Petitioner and higher prices to the buyer.

The District Court was in grave doubt as to the validity of the Administrator's claim.

The discount regulations (Sec. 1364.453 (b) of R.M.P.R. No. 169 and 15 (b) of M.P.R. No. 398), require the discount when, (1) meat is *delivered* in a carload shipment or (2) sold as a *carload sale*. Neither of these prerequisites is present under the facts.

Definitions of the word "carload" in the discount regulations bear out Petitioner's contentions.

The construction of the discount regulations by the Court of Appeals renders these provisions confusing and discriminatory.

The interpretation of the discount regulations by the Administrator, announced at the time of the issuance of the regulations, demonstrates that these provisions contemplated a single buyer taking delivery of a carload quantity.

This interpretation is the ultimate criterion of construction under

> *Bowles* v. *Seminole Rock and Sand Co.*, 325 U. S. 410, 414.

Sales and deliveries to a number of buyers "out of" a carload, entails greater handling and selling costs than the sale and delivery of a carload.

The purpose of the Statement of Considerations is to apprise the public of the intent and object of the regulations. The Statement of Considerations by the Administrator is not a gratuitous or casual announcement, but is peremptorily required by the Price Control Act.

Title 50 U. S. C. A. App. Sec. 902 (a).

The practical interpretation of the discount regulations by the Price Administrator, as shown by his apparent approval of the Washington System, shows that he regarded the discount as applicable to the sales price of carload quantities to single buyers of carload quantities.

The Washington System, being identical with the Boston System, except as to cartage from the freight car to the buyer's place of business, the approval of such Washington System by the Administrator, or even his failure to object thereto, constitutes a practical construction of the discount provisions.

> Failure to assert a power by an administrative agency on the question as to whether or not such power was intended to be conferred is significant.
>
> *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 352.

II.

The Court of Appeals erred in failing to construe the carload discount provisions of R.M.P.R. 169 and M.P.R. 398, in accordance with the original interpretation of the Price Administrator and in adopting an inconsistent and different construction conceived and put forward by the Administrator after transactions occurred under contractual relationships created subsequently to the original, published administrative interpretation of the regulations.

The later construction of the discount provisions to the effect that the discount was applicable to buyers *out of* a

carload of meat contained in a freight car, effected a complete change from the original interpretation by the Administrator.

The original construction made public for public guidance cannot be cancelled by a changing enforcement policy.

No notice was given by the Administrator that he intended to enforce the discount provisions as to buyers of portions of a carload shipment, until September, 1944, when Petitioner at once stopped the practice. This suit was begun in October, 1944.

In the interim between the issuance of the regulations and the first declaration of purpose, and the time when the Administrator announced a diametrically different construction, the contracts made and obligations created should not be made the subject of attack by the Administrator.

Unless the original published Statement of Considerations is regarded as written into the regulations, there will be no certain rule of conduct by which the public can order its affairs.

There are actual additional handling and selling costs in the sale of quantities smaller than a carload. If these costs be disregarded and if only the transportation charge is taken into consideration, then there is a taking of property without due process of law, a construction which is not only not required but which is opposed to the language of the provisions and the officially announced construction thereof by the Administrator.

ARGUMENT.

I.

The carload discount provisions of revised maximum price regulation No. 169, as amended, and maximum price regulation No. 398, as amended, are not applicable to actual sales of less than carload lots where the contents of such carloads are sold and invoiced to several separate buyers and where the seller ships the carload quantity to a designated consignee, the buyers of the contents taking possession and delivery at the point of destination of the carload.

The Court of Appeals below stated the question presented to it for decision as follows: "The question presented by these shipments is whether the carload discount provisions of R.M.P.R. No. 169 and M.P.R. No. 398, *supra*, are applicable to actual sales of less than carload lots where the seller ships in carload quantities to a designated consignee and the buyers take possession and delivery from the point of destination of the carload. The answer to the inquiry depends upon the interpretation of the regulations." (156 Fed. 2nd at page 194).

The court announced the major issue with substantial correctness. It is in its answer to the inquiry that the error of the court is found. That error resulted from the failure of the court to consider all of the pertinent provisions of the discount regulations which must be examined together to ascertain the administrative intent as to the particular discount provisions in controversy and, also, from the failure of the court to give to the regulations the interpretation announced by the Price Administrator at the time of the issuance of the carload discount provisions.

The plain language of the regulations, the interpretation by the Price Administrator at the time of the issuance thereof, his practical construction thereof, the administrative intention back of the language used, and the whole

scope and purpose of the Emergency Price Control Act, all demonstrate that the carload discount provisions of the regulations in question apply to shipments of carload quantities *to buyers of carload of quantities.* This result is imperative from the language of the regulations themselves. As will be perceived from the ensuing argument, the Office of Price Administration, and the District Court and the Circuit Court of Appeals all failed to distinguish between "shipment" and "sale", two words which are used in the regulations under consideration in a discriminatory and logical sense.

As the court below said, the facts are not in dispute. The alleged violations in failing to deduct from the zone price the twenty-five cents per hundredweight discount occurred between October 6, 1943 and October 4, 1944. Only carloads of meat weighing more than 15,000 pounds are involved. During the stated period Petitioner shipped 10,218,732 pounds of beef carcasses and cuts of beef and 1,442,757 pounds of variety meats and edible by-products, without deducting the twenty-five cents per hundredweight discount. The discount in the sale of beef carcasses and cuts, if allowable, amounts to $25,546.82 and the discount as to variety meats and edible by-products, if allowable, amounts to $3,606.89. (See opinion of court below 153 Fed. 2nd at page 194).

Petitioner, as the undisputed evidence discloses, sold and shipped meat in carloads usually amounting to 25,000 pounds or more under two systems or methods of sale and delivery, both of which had been adopted long prior to the enactment of the Emergency Price Control Act and had grown into a fixed practice (R. 35). Throughout this litigation, for purposes of convenience, one method of sale and shipment was designated as the "Boston System" or

"Boston Method", and the other the "Washington System" or "Washington Method." The essential identity of these two practices will be discussed at a later portion of this brief. The affirmed judgment of the District Court resulted from the fact that Petitioner did not allow to its customers who purchased in less than carload quantities the carload discount in the transactions conducted under the "Boston Method."

A succinct, exemplary description of the "Boston System" is set forth in the opinion of the Court of Appeals as follows:

> "The practice of the defendant giving rise to the present dispute is illustrated by the shipment of its beef products to the city of Boston where it had four customers to whom it sold an average of one or more carloads a week during the period involved. *The part of each carload sold to one of these customers was less than 15,000 pounds,* but the total carload or the sum of the four sales exceeded that amount. The car was consigned to one party *but the contents were labeled and invoiced to the several customers.* Upon arrival of the car in Boston the consignee notified the purchasers *each of whom thereupon picked up his portion of the shipment.* The defendant paid the freight charges to Boston and each customer paid the transportation charges from the point of delivery to his place of business." (Italics supplied).

From this example it will be seen at once that the sale of meat was to buyers of quantities smaller than carload lots and it will be perceived, also, that the buyer of a carload quantity received no discount advantage over buyers "out of" the carload no matter how small were their purchases.

When the Court of Appeals said that, "without hesitation both the Administrator and the trial court construed

these regulations to be applicable to defendant's practice of selling its beef products," it was clearly in error. Repeatedly in the record the doubt of the trial judge is plainly evident.

In the memorandum decision which was made part of the Findings of Fact, the Conclusions of Law and the Order for Judgment, the trial court said that the regulations were "involved" and that laymen could well err in violating them even though practical precautions were taken against such violations. The trial judge, moreover, found that petitioner had sustained the burden of taking such practical precautions, and in this connection said,

> "It must be recognized that the regulations are at least somewhat involved and laymen could well err in unwittingly violating them even though they took practical precautions against such violations. The term 'practical precautions against violations' is not susceptible of a hard and fast interpretation. It may be stated that it fairly encompasses the type of precaution which should be maintained by a reasonably prudent business man to safeguard his business against price violations. Using such a standard or yardstick, it does not necessarily follow that every business institution must hire a lawyer to render a legal opinion on every regulation which may be applicable to its business." (R. 93.)

Quite obviously the trial court could not have found that Petitioner had sustained the burden of taking practical precautions against violations if the language of the regulations was clearly in accord with the Administrator's present contention. Necessarily it follows that it was by the construction of language beyond its normal meaning that the court was induced to enter the judgment. It is true, as the Court of Appeals in its opinion said, (156 Fed. 2nd 195) the trial court in its opinion observed that an analysis

of the facts establishes that the particular meat was shipped by rail in carload quantities to a single consignee at a rate which was less than the transportation (charges) for such shipment at the railroad less-than carload rate." But the Court of Appeals did not observe that in the very next sentence of his memorandum the trial judge said, "some confusion, however, or at least room for argument has arisen on account of the language used in the Statement of Considerations under the heading 'Carload Discount'. The trial court said that the last sentence of the pertinent statement of considerations 'would indicate that it was assumed that carload discounts would apply only to a single buyer taking 15,000 pounds or more of beef or mixed meats in a carload shipment." (R. 87) Later, in its memorandum of opinion, the trial court, in speaking of the larger return to petitioner under the so-called "Washington Method" (which was approved by the Price Administrator) over the "Boston Method", said (R. 89) "While the situation may present an anomaly in light of the purpose of price control, it would seem that this court is without authority to correct the matter."

When Petitioner presented its application to the District Court for leave to appeal to the Emergency Court of Appeals, the court, disagreeing with the administrator's contentions, said (R. 112) "I have ordered the Superior Packing Company to pay about thirty thousand dollars. In doing so I had no authority to pass upon the validity of the regulations. I thought it was then a very, very close question and a very anamolous question, because, even though I found that the Superior Packing had not followed the regulations promulgated by the Administrator, I had to recognize that after following the regulations they made more money on any deal than they did when they had

disobeyed the regulations." The Court said, further, that "there was this conflict between some of the language used by the Administrator in the regulations. It wasn't entirely clear."

There is doubt inherent even in the opinion of the Court of Appeals when it said, speaking of the announcement of purpose by the Administrator in his Statement of Considerations, "This statement seems to support the defendant's interpretation of the regulation." (156 Fed. 2nd at page 195).

Under such circumstances it is necessary, it is respectfully submitted, that this Court set at rest the doubt existing in the minds of the trial court, the Court of Appeals and of the public by giving to the carload discount provisions of the regulations under consideration a final and authoritative construction.

The Regulations.

The language of the regulations themselves, including the definitions, should leave no room for doubt that the discount was intended to be applicable, not to carload shipments to a given point of destination but to carload sales.

The provision of RMPR No. 169 applicable to beef carcasses and cuts is contained in section 1364.453 (b) as follows:

> "Carload discount. For all beef carcasses and/or beef wholesale cuts and/or other meat items subject to this subpart B and Sec. 1364.453 and Sec. 1364.454, *delivered in a straight or mixed carload shipment* or *sold* as a *part of a straight or mixed carload sale,* the seller shall deduct 25 cents per hundredweight from the applicable zone price." (Italics supplied)*

* The carload discount provisions of MPR398 appertaining to variety meats and by-products are practically identical and hence no special mention thereof will be made in this brief. The argument is the same as to the discount provisions of both regulations.

From the foregoing language the Court will observe that the discount from the applicable zone price is to be granted by the seller when either of two alternatives exist, one of which is the *delivery in a carload shipment* and the other of which is a *carload sale*. When, in this section, it is provided that "the seller shall deduct 25 cents per hundredweight from the applicable zone price" the deductions must contemplate a lower price to the buyer to whom "a straight or mixed carload shipment" has been *delivered* or to whom there has been *a carload sale*, pursuant to contract of sale. It is obvious that buyers of meat in amounts less than carload quantities did not receive meat "delivered" to them in a "carload shipment" and neither did they receive delivery of meat "sold" to them as part of a straight or mixed "carload sale." There is no "delivery" of a carload lot to the buyer of less than a carload, and there is no carload "sale" to the buyer of less than a carload.

The definitions which are part and parcel of the regulations evidence a plain administrative intent to award the discount to buyers "of" and not to buyers "out of" carload shipments. "Carload" is defined in Sec. 1364.455 (a) (2), paragraph (i), as a "shipment * * * to a single delivery point, of at least a minimum weight upon which the relative carload rate from the point of shipment to the delivery point, as evidenced by the tariffs of railroad carriers is based." The Court will note that this language merely defines the word "carload" in terms of freight rates.

"Carload" when transportation is by motor truck, (Paragraphs ii) is defined as follows:

> "A shipment by motor truck or trucks to a single delivery point of 15,000 pounds or more of fresh or

frozen wholesale meat cuts and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing *as a single bulk sale transaction.*" (Italics supplied)

It is inconceivable that the Office of Price Administration intended the carload discount to apply to separate sales, no matter how small, out of a delivery of a carload lot of 15,000 pounds or more when transported by railroad and in the same regulation allow the discount only to buyers of a total 15,000 pounds or more when delivered by motor truck to a single delivery point as a "single bulk sale transaction."

Paragraphs iii of Section 1364.455 (a) (2) of the regulation brings the administrative intent into still sharper focus when it provides that "carload" • • means "*any single bulk sale transaction* wherein the buyer takes delivery *at the seller's place of business* of 15,000 pounds or more • • •." *Here no transportation charge at all is involved and yet the buyer gets the carload discount not because of reduced cost to the seller in transportation charges but because of the amount purchased.*

From such overall consideration of the regulations and their accompanying definitions the conclusion is inevitable that the Administrator intended to legislate with respect to the quantity of the sale and not to the capaciy of the medium of transportation. Sanely considered, the regulations seem to be concerned with the contractual undertaking of the buyer and not to his chance good fortune in happening to be a purchaser of a small quantity deliverable out of a large *freight* shipment.

When, therefore, in Section 1364.453 (b) of RMPR 169, the word "delivery" is used it must mean delivery to the buyer. To the buyer of what? This in turn, must mean

to the buyer of a straight or mixed "carload shipment". As has been said, there is no delivery of a carload shipment to buyers of quantities smaller than carload lots, and there is no carload sale to such buyers. The antecedent contractual basis for the discounted price is absent.

To read the discount regulations as construed by the Court of Appeals, would make the relevant section of R.M. P.R. 169 recite:

> "For all beef carcasses • • • delivered (to buyers of part of) a straight or mixed carload shipment, or sold as part of a straight or mixed carload (shipment) the seller shall deduct, etc."

The interpolation of the language "to buyers of part of" and the changing of the word "sale" to "shipment", would radically alter the basic meaning of the regulations as deliberately phrased by the Office of Price Administration.

The original interpretation of the regulations by the Price Administrator.

The Price Administrator left no room for doubt as to his interpretation of the discount regulations when he issued, in connection therewith, his Statement of Considerations. Under the heading, "Carload Discount" (Par. G1), the Administrator said:

> "Provisions have been made in the regulation to allow for adjustment in price to cover extra costs involved. On the same basis a reduction in the price must be made where certain costs are not incurred. The base price in the regulation has been established for less-than-carload lots, whereas it costs less *to sell* in larger quantities. Recognizing this, the specified maximum prices are reduced 25 cents per hundredweight where 15,000 pounds or more of beef or mixed meats are delivered to a single destination in a carload

shipment. This reduction roughly reflects the savings in handling and selling costs which are effected *when a single buyer takes one delivery of a volume this large.*" (Italics supplied.)

This language, said the Court of Appeals, "seems to support the defendant's interpretation of the regulation." (156 Fed 2d at page 195). The Court of Appeals, however, fell into the error of accepting the Administrator's *contention* that the language used in his Statement of Considerations was for the purpose of illustration only, and cannot be construed to conflict with the plain terms of the regulation. As has been seen, the plain terms of the regulations contemplate that the discount shall be allowed in the case of a single sale and a single delivery involving a shipment of 15,000 pounds or more. To assert that the announcement of intention by the Administrator, as contained in the foregoing quotation from his Statement of Considerations was merely language by way of illustration, is to do violence to the language itself. The Administrator plainly said that, recognizing that it costs less to sell in quantities larger than less-than-carload lots, the specified maximum prices are reduced twenty-five cents per hundredweight "where 15,000 pounds or more of beef or mixed meats are delivered to a single destination in a carload shipment." "This reduction," said the Administrator, "roughly reflects the savings in handling and selling costs which are affected *when a single buyer takes one delivery of a volume this large.*" There can be no possibility of a double meaning to this language. It must be remembered, also, that the Administrator significantly stated that, "it costs less *to sell* in larger quantities."

The contention that the Administrator intended to use the "single sale" idea in the case of delivery by truck

and contemplated a plurality of sales in the case of delivery by freight car, neglects to observe that the administrative purpose was announced in terms of sales of carload quantities without regard to the medium of transportation.

The language of the regulations themselves, illuminated by the Statement of Considerations, discloses an original recognition of the practical differences between carload *shipments* and carload *sales*. When the discount provisions were promulgated, the Office of Price Administration manifested a realistic appreciation of the additional effort and expense entailed by separate sales to individual customers, though the merchandise be deliverable out of a carload, over the effort and expense involved in a single sale of a carload quantity. Petitioner, when it loaded a car or a truck with meat sold to a number of individual buyers, was required to tag and package separately the goods designated for each purchaser. Separate sales involved separate sales efforts, separate orders, separate invoices, separate bookkeeping, separate collections and separate receipts. Obviously, the cost of "handling and selling" includes much more than the mere transportation charge.

Viewed from the standpoint of the buyer, it must be remembered that the Emergency Price Control Act, in addition to its broad purpose of preventing inflation, possessed an immediate and practical purpose of protecting buyers from excessive prices. In this case the buyers to be protected and who were to receive the benefit of the discount were buyers of carload quantities who are required to make larger investments, undertake greater risks, have larger storage and refrigeration facilities and greater obligations. If the views of the Court of Appeals be accepted, the buyer, for example, of 25,000 pounds of meat in a single sale, completed by a single shipment, would pay exactly the same

price as 25 buyers of 1,000 pound lots. And this construction is apparently accepted by the court below, notwithstanding that in such piece-meal sales of carload lots, there would be 25 orders, 25 invoices, 25 selections and allocations, 25 packaging operations, 25 weighing operations, 25 collections and 25 times as much bookkeeping and overhead effort. As has been said, all of this seems to have been recognized at the time of the issuance of the discount regulations by the Price Administrator in his Statement of Considerations.

What, it may be inquired, is the purpose of a Statement of Considerations? To give illustrations? Such a conclusion, successfully imposed upon both courts below, ignores the plain dictionary definition which defines "consideration" as "that which is or should be considered as a ground of opinion or action; motive; reason." (Webster's New International Dictionary, page 479).

Because the language of the Statement of Considerations is at variance with the construction invoked for the purposes of the present case against Petitioner, the Administrator argued that "in any event, as the trial court said, even if the Statement of Considerations was not in harmony with the express provisions of the regulations, the regulations, and not the Statement of Considerations, are controlling." To support this assertion, the Administrator cited to the court below *Bowles* v. *870 Seventh Avenue Corporation,* 150 Fed. 2d, 819 (C.C.A. 2). An examination of this decision, however, discloses that, instead of disregarding the Statement of Considerations there involved, *the Court of Appeals invoked its aid in considering the regulations and in deciding the controversy.* (See Opinion of the Court at page 821.)

Statements of consideration proclaimed by the Price Administrator at the time of the issuance of his regulations are not gratuitous or casual. On the contrary, they are commanded by peremptory language of the Emergency Price Control Act itself which provides as follows:

> "Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a Statement of Considerations involved in the issuance of such regulation or order." (U.S.C.A. Tit. 50, App. Section 902a).

The legislative purpose of requiring such a proclamation by the Administrator must be to apprise the public of his intention in issuing his edicts. Such official statements so required by the statute are made public for the guidance of the public. Therefore, if any additional light be required as to the meaning and intent of the discount regulations involved in this proceeding, it is found in the Price Administrator's own Statement of Considerations.

The effect of the practical interpretation by the Price Administrator, as shown by his approval of the Washington System.

As has been seen from the Statement of Facts in the foregoing petition, Petitioner, prior to the enactment of the Price Control Act, had used two systems of selling to customers at eastern points and shipping in carload quantities. The "Boston System," sales pursuant to which gave rise to the present controversy, has been heretofore in this argument sufficiently discussed. Under the "Washington Method" Petitioner, instead of consigning the carload to one of the customers as the designated consignee, consigned the car to itself, or to its agent. When the car arrived at its destination, Petitioner arranged and paid for delivery to the places of business of the several purchasers who had made purchases of portions of the carload lot. Pur-

suant to authorization contained in Sec. 1364.453(b), Petitioner made a charge of twenty-five cents per hundredweight for delivery from the freight car to the place of business of the buyer. The actual cost of such local delivery was approximately ten cents per hundredweight less than the delivery charge allowable under the regulation, with the result that Petitioner received a spread of ten cents per hundredweight, or the difference between the actual cost of the local cartage and the authorized delivery charge. Moreover, under the "Washington System" Petitioner was not required to allow the twenty-five cents per hundredweight carload discount from the zone price (R. 88).

While sales under the Washington practice are not in controversy, evidence as to the practice thereunder was introduced for the purpose of demonstrating, not only the inconsistent enforcement policy of the Office of Price Administration in bringing suit for what it deemed violations of the discount regulations by the Boston method of operation while at the same time approving the "Washington System" which was more profitable to Petitioner, but, also, to show the practical interpretation of the regulations by the Office of Price Administration.

The two systems of making carload shipments to the East, are in all fundamental respects identical. Under each practice the loading of the car for transportation was preceded by individual orders for less than carload quantities. The shipment of the carload was but a method of delivery to the point of destination where all of the buyers were located, of an amount of goods as to which each buyer had entered into a previous contractual obligation. Petitioner paid the freight to the point of destination under both methods. In each case there was the same selection and appropriation of the goods to the contract, the

same separate invoicing, the same separate collections and the same allocable overhead and selling cost. The only difference between the two practices appears in the additional profit to Petitioner derived from the local deliveries from the freight car to the places of business of the several buyers of the contents of the car, with resultant higher cost to the buyer,—to which the Office of Price Administration has made no objection. It was this similarity and this extra compensation to Petitioner which was not questioned by the Administrator that caused the trial court to say that it thought the issue was "a very, very close question and a very anomalous question, because even though I found that the Superior Packing Company had not followed the regulations promulgated by the Administrator, I had to recognize that after following the regulations they made more money on any deal than they did when they disobeyed the regulations." (R. 112). The trial judge said, further,

> "but it seems to me that I should take a rather broad-gauged view of this and I am convinced, at least on the record before me, that the Packing Company acted in good faith. True, as I pointed out, they didn't hire a lawyer to advise them as to the interpretation to be given to these regulations. But there was this conflict between some of the language used by the Administrator in the regulations. It wasn't entirely clear. I could readily understand how they fell into this error, and yet I was bound to return the judgment I did." (R. 112)

(It has been pointed out that Petitioner, when objection was made to its Boston method, adopted the "Washington System", with profit to itself, for all eastern sales.)

The knowledge and approval of the Washington practice thus furnishes another evidence of administrative interpretation. Practical construction by administrative

agencies in the enforcement of their regulations, like the practical conduct of parties to a contract in operating under it, frequently furnishes the best interpretive light where clarification of language is desirable.

In *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349; 85 L. ed. 881, the Supreme Court, in speaking of the effect of the Federal Trade Commission's continued failure theretofore to attempt to exert control under circumstances then before the Court, said, at page 352:

> "But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."

The language of the discount regulations, the original interpretation thereof by the Price Administrator, and his practical interpretation as evidenced by his apparent approval of the Washington method, all point to the inescapable conclusion that the price discount was intended to, and does, apply to a single delivery under a single sale.

II.

The Court of Appeals erred in failing to construe the carload discount provisions of R.M.P.R. 169 and M.P.R. 398, in accordance with the original interpretation of the Price Administrator and in adopting an inconsistent and different construction conceived and put forward by the Administrator after transactions occurred under contractual relationships created subsequently to the original published administrative interpretation of the regulations.

This Court in *Bowles* v. *Seminole Rock and Sand Co.*, 325 U. S. 410, a case which involved the problem of deter-

mining the price charged within the meaning of a regulation issued by the Price Administrator, said:

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

The Court of Appeals below gave lip service to this decision, but, instead of turning to the administrative construction made public at the time of the issuance of the regulations, relied upon the "contention" of the Administrator to the effect that the discount was applicable to sales of less than carload amounts out of carload shipments, and regarded such contention as the Administrator's construction as to the effect of the language used in the regulations.

The Administrator's later "construction" of the regulations, which was adopted by the courts below, effected a complete change from the original announcement of purpose in the Statement of Considerations. This change in administrative construction was not made known until shortly before the commencement of this action against the Petitioner. Petitioner was advised that its Boston practice was objectionable in September, 1944. (R. 35). As the trial judge found, "it was not until September, 1944, that the defendant learned from the officials of the Office of Price Administration that, under one method, it was violating the law, and under the other method the regulations were not being contravened." (R. 93) The present action was commenced on October 5, 1944. (R. 6).

The Administrator's original interpretation of the discount provisions, to the effect that the carload discount was allowable when a single buyer takes one delivery of a carload volume, became written into the regulations themselves, if the language of this Court in *Bowles* v. *Seminole Rock and Sand Co.* is to be followed. What could be the purpose of requiring a pronouncement of intention at the time of the issuance of a regulation if it be not to apprise the public of the intention of the Administrator in issuing his edicts? Such contemporary Statements of Consideration must be regarded as controlling unless plainly erroneous. Commanded as they are by statute, they are made public for public guidance. Any subsequent attempt to superimpose upon the language used in the regulations a later construction, is nothing less than *ex post facto* opportunism. In this connection, it is submitted, the Court of Appeals overlooked Petitioner's argument that the orderly and constitutional administration of justice demands that the original interpretation (required to be issued as a matter of law) must endure throughout the life of the regulation in question. Otherwise the requirements of the statute, ordering the Administrator to proclaim his purpose and objective, would be utterly meaningless, and the administration of justice in such matters an uncertain and dubious enterprise. True, the judgment against Petitioner, except for a minor and irrelevant item, was for single damages only, but the theory upon which the judgment is predicated permits the imposition of heavy penalties under circumstances comparable to the facts at bar.

The discount regulations speak of sales and deliveries in carload quantities of 15,000 pounds or more. When the Administrator said that the discount reduction reflected "the savings in handling and selling costs which are ef-

fected *when a single buyer takes one delivery of a volume this large,*" what conclusion could a selling member of the public, already showered with governmental regulations, orders, edicts, proclamations and directives, draw from such language other than that he was supposed to allow the discount to "a single buyer" who contracted for and took "one delivery of a volume this large."

It must be borne in mind that immediately when Petitioner was notified by the Office of Price Administration that the Boston practice was objectionable, it was abandoned, and Petitioner adopted in its place the Washington practice, to Petitioner's permitted profit. As the trial court observed, Petitioner's question was a pointed one when it asked, "how the Boston method can be stamped as inflationary if it results in a lower price to the buyer as compared to the approved Washington practice." (R. 89.)

In the interim between the Price Administrator's original announcement of purpose and the notification to Petitioner that its Boston practice was objectionable, many contracts of sale and millions of pounds of deliveries had been made. Petitioner had ordered and conducted its business under the justifiable belief that it was not required to allow a carload discount to purchasers of less than carload quantities. It had contracted for cattle, slaughtered cattle and allocated beef and wholesale cuts of beef and variety meats to particular customers, had made out and sent its invoices, had received and collected payment and had made all of the entries in its books and records, under the belief that the Administrator meant what he said when he talked of carload discounts to a single buyer taking delivery of carload amounts. To ignore this proclamation of purpose would be to sanction administrative deceit with all of the damaging consequences which could flow

from public reliance upon the deliberate language of a responsible government official.

This Court, having already held in *Bowles* v. *Seminole Rock and Sand Co.*, 325 U. S. 410, that the ultimate criterion in the construction of a regulation is the administrative interpretation, it is necessary for the Court to supplement this opinion by a further pronouncement to the effect that an administrative interpretation, once proclaimed, is binding not only upon the public but upon the Administrator, at least as to all transactions consummated before any announced change by the Administrator in the construction of his own regulations.

There is another potent reason why the discount provisions of the regulations in question should not be given the effect for which the Administrator now contends and which has the sanction of the Court of Appeals. No one will deny that there is an actual, additional cost to the seller in making a number of sales over the cost involved in making a single sale of the same total quantity. No one will deny that the cost of transportation is but one of the items to be taken into consideration. The effort of obtaining or receiving a small order for merchandise, especially in these days of shortage conditions, is about the same as the effort expended in obtaining and receiving an order comprising a carload quantity. Each smaller order must be packaged, tagged and recorded. Each smaller order requires identically the same amount of time and overhead as the sale of a larger quantity. Each smaller order is the subject of the seller's accounting. Each smaller order must be invoiced and the amount due thereon must be collected. Obviously, the preparation for shipment of a number of orders consumes more time and labor than one large order. Therefore, if the price discount regulations require an arbi-

trary deduction from an authorized zone price, of a fixed discount of twenty-five cents per hundredweight, based upon the cost of transportation only, there is a taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. Neither the language of the regulations themselves nor the acceptable administrative interpretation thereof requires that the label of unconstitutionality be pinned upon the discount provisions of these regulations.

CONCLUSION.

To ascribe to the price discount regulations the meaning given to them by the Court of Appeals, would be to change the plain import of the language used. It would make them order a discount to buyers of less than carload lots who receive delivery out of a railroad carload shipment, while denying the discount to similar buyers where delivery is by truck. It would award the discount to buyers of 15,000 pounds or more who take delivery from the seller's place of business where no cost of transportation is involved, and give the identical discount to buyers of 15,000 pounds where the cost of transportation is involved. It would single out for favorable treatment buyers of less than 15,000 pounds, or less than a carload, who happened to be located at the point of destination of a railroad freight car. It would contemplate a "group" or "community" discount to disassociated buyers of portions of a freight car load. It would strike from the record the solemn statement of the Administrator, issued under statutory direction, that the discount contemplated single sales to buyers of carload quantities. It would approve an *ex post facto* construction

diametrically opposed to the proclaimed purpose, after rights and liabilities are created under justifiable belief in the original announcement. It would disregard all elements of cost to the seller, except the cost of transportation. It would allow, in effect, the taking of property without due process of law.

The court below did not take into consideration that all of the regulations issued under the various war emergency powers were conceived and promulgated to meet the necessities of an economy strained and distorted by the war effort. In this deluge of administrative "laws", the public, as it had a right to do, looked to the published proclamations of purpose of the many war agency administrators. The Price Administrator's Statement of Considerations, issued at the command of Congress, must have been designed to announce the very reason and purpose of the discount regulations. Under that announcement, as well as under the language of the regulations themselves, the judgment against Petitioner is unsustainable.

This Court frequently has had occasion to remind administrative agencies of the necessity of conforming to proper legal standards in the exercise of their judicial function. (*Morgan* v. *U. S.*, 304 U. S. 1, 19, 22; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 290, 304; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, 93; *"The Task of Administrative Law"*, Frankfurter, 75 University of Pennsylvania Law Review 614, 618.) It is respectfully urged that legislative standards of clarity and consistency also must be observed by administrative agencies in their law making function, and the instant Petition presents to the Court the opportunity and the necessity of establishing the law upon this subject.

It is urged that the judgment of the Circuit Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

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